

89-657

NO.

Supreme Court, U.S.

FILED

OCT 23 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1989

PHYLLIS BEATTY CALABRO,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
WORKMEN'S COMPENSATION APPEAL
BOARD (ROCKWELL INTERNATIONAL),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES SUPREME COURT FROM THE SUPREME
COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

SIMON B. JOHN, ESQUIRE
Attorney for Petitioner
96 East Main Street
Uniontown, PA 15401
412- 438-8560

43pp



QUESTION PRESENTED FOR REVIEW

1. Whether the Pennsylvania Workmen's Compensation Act and the regulations promulgated thereunder violate Petitioner's constitutional right to due process and equal protection under the law?



PARTIES INVOLVED IN THE PROCEEDING

The parties presently before this
Honorable Court consist of the following:

1. **Petitioner:** Phyllis Beatty Calabro.
2. **Respondent:** Commonwealth of
Pennsylvania, Department of Labor
& Industry, Workmen's Compensation
Appeal Board.
3. **Respondent:** Rockwell International,
Former Employer of Petitioner.

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TABLE OF AUTHORITIES

<u>Mapp v. Philadelphia</u> , 433 PA. 517, 252 A.2d 684 (1969).	15
<u>Weiss v. Cambridge Springs Borough</u> , 262 PA. 139, 104 A.2d 863 (1918).	23
<u>West Ohio Gas Company v. Public Utility Commission of Ohio</u> , 55 S.Ct. 316, 294 U.S. 63, 79 L.Ed. 761.	15

CONSTITUTIONS, STATUTES & REGULATIONS:

United States Constitution, Fourteenth Amendment	8,14,15
Pennsylvania Constitution, Article I.	8,14
Pennsylvania Workmen's Compensation Act, as amended, codified at:	
77 P.S. §§ 1 et seq.	8,10
77 P.S. § 853	8,16,17,19,22
77 P.S. § 854	8,16
77 P.S. § 717.	8,17
28 U.S.C. § 1257(a)	7
34 Pa. Code § 131.3	8,18



OPINIONS DELIVERED BY THE COURTS BELOW

The following Opinions have been rendered
by Courts below:

A. The Supreme Court of Pennsylvania,
Western District Order dated July 24, 1989.

"July 24, 1989, Petition denied
Per Curiam."

B. Commonwealth Court of Pennsylvania
unreported Memorandum Opinion and Order dated
February 8, 1989:

"The Workmen's Compensation Appeal
Board Order No. A-93732 dated April 13,
1988 is affirmed."

C. Workmen's Compensation Appeal Board
of Pennsylvania Per Curiam Opinion and Order
dated April 13, 1988:

"The decision of the Referee is
hereby affirmed and claimant's appeal
is denied."



STATEMENT OF GROUNDS ON WHICH
JURISDICTION IS INVOKED

Petitioner seeks review of the Order of the Supreme Court of Pennsylvania, Western District, dated July 24, 1989. In that Order, the Pennsylvania Supreme Court denied Phyllis Beatty Calabro's Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania, dated February 8, 1989 which affirmed the decision of the Workmen's Compensation Appeal Board of Pennsylvania, dated April 13, 1988.

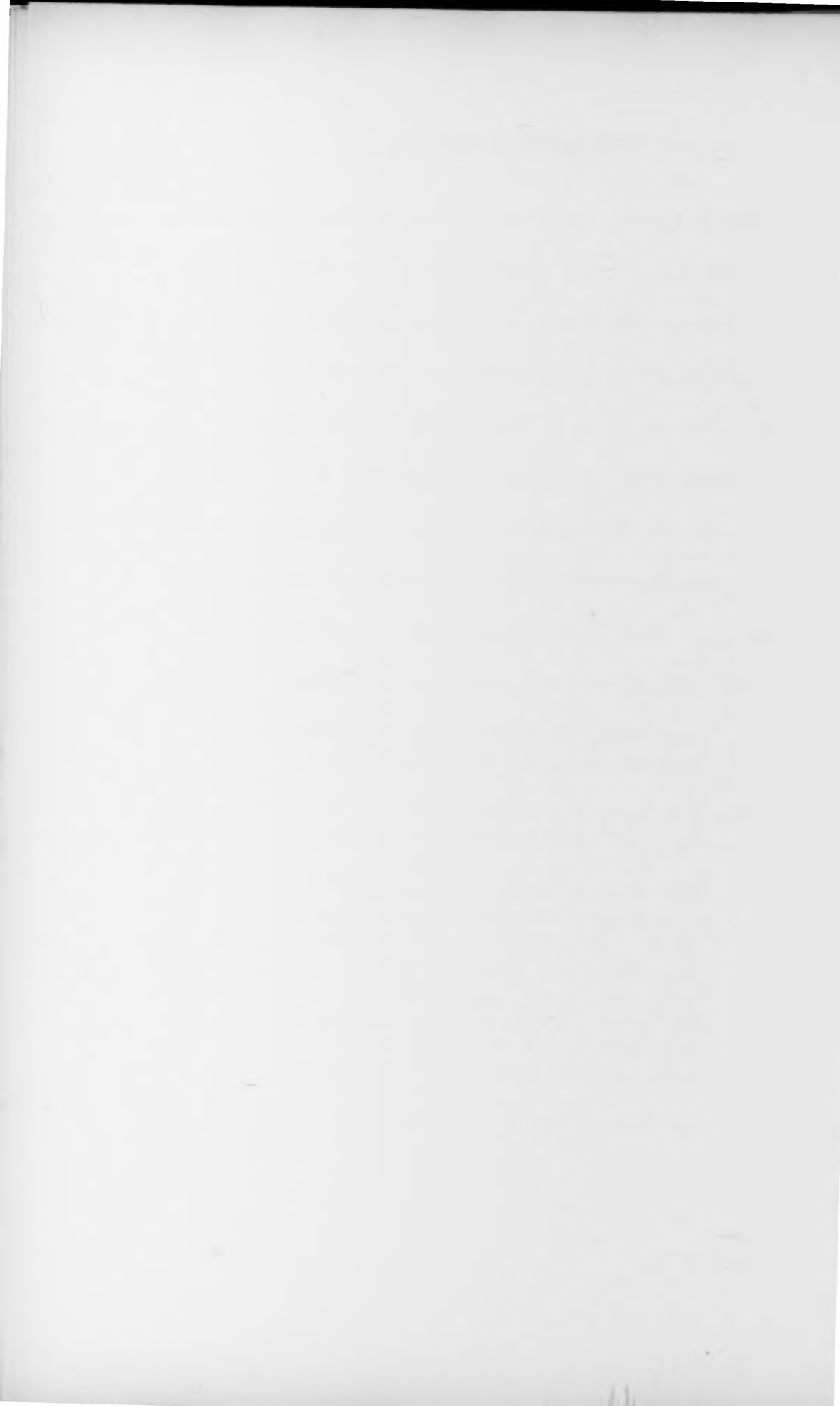
The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257(a) and Supreme Court Rule 17(c).



STATUTES INVOLVED

Petitioner is challenging the constitutionality of those provisions of the Pennsylvania Workmen's Compensation Law and the regulations promulgated thereunder, pertaining to the filing practices and procedures for notices of appeal from decisions of Workmen's Compensation Referees of the Pennsylvania Department of Labor and Industry. The constitutions, statutes and regulations involved are as follows:

1. Fourteenth Amendment to the United States Constitution;
2. Article 1, Section I of the Pennsylvania Constitution;
3. The Pennsylvania Workmen's Compensation Law, as amended 1974, December 5, P.L. 782, No. 263, as codified at 77 P.S. §§ 1 et seq. and particularly, those sections set forth at P.S. § 717; 77 P.S. § 853 and 77 P.S. § 854;
4. 34 Pa. Code § 131.3.



The relevant portions of the above-referenced authorities are set forth at Appendix "D".



STATEMENT OF THE CASE

Your Petitioner, Phyllis Beatty, now Phyllis Beatty Calabro, was injured during the course and scope of her employment at Rockwell International on November 16, 1981. On that date, at or about 6:00 a.m., she sustained an injury to her left arm and left shoulder when she was attempting to lift a 100 (one hundred) pound bag of sand.

Mrs. Calabro filed a timely Claim Petition seeking benefits pursuant to the Workmen's Compensation Act, 77 P.S. Sections 1 et seq., for the injury to her left shoulder and arm. After hearings, Referee Barbara Luich issued an order on March 14, 1984 disallowing the Claim Petition.

Thereafter, Mrs. Calabro appealed to the Workmen's Compensation Appeal Board (hereinafter referred to as "Board"), Department of Labor and Industry. On March 19, 1986, the Board reversed and remanded the



decision of Referee Luich. Thereafter, Mrs. Calabro's employer filed a Petition for Review with the Commonwealth Court of Pennsylvania. That Court, by order dated September 10, 1986, remanded the matter to Referee Luich. Referee Luich held further hearings, after which she issued a decision dismissing the Remand Claim Petition. Another appeal to the Workmen's Compensation Appeal Board followed, and that Board issued a per curiam decision on April 13, 1988 affirming the decision of Referee Luich and denying Mrs. Calabro's appeal.

Petitioner thereafter sought review by the Commonwealth Court of Pennsylvania. The employer, Rockwell International, (hereinafter referred to as "Rockwell") had previously filed with the Board a Motion to Dismiss alleging that Mrs. Calabro's appeal from the decision of Referee Luich dated May 21, 1987 was not filed in a timely manner. Mrs. Calabro filed a Response in Opposition thereto and in addition, had previously filed

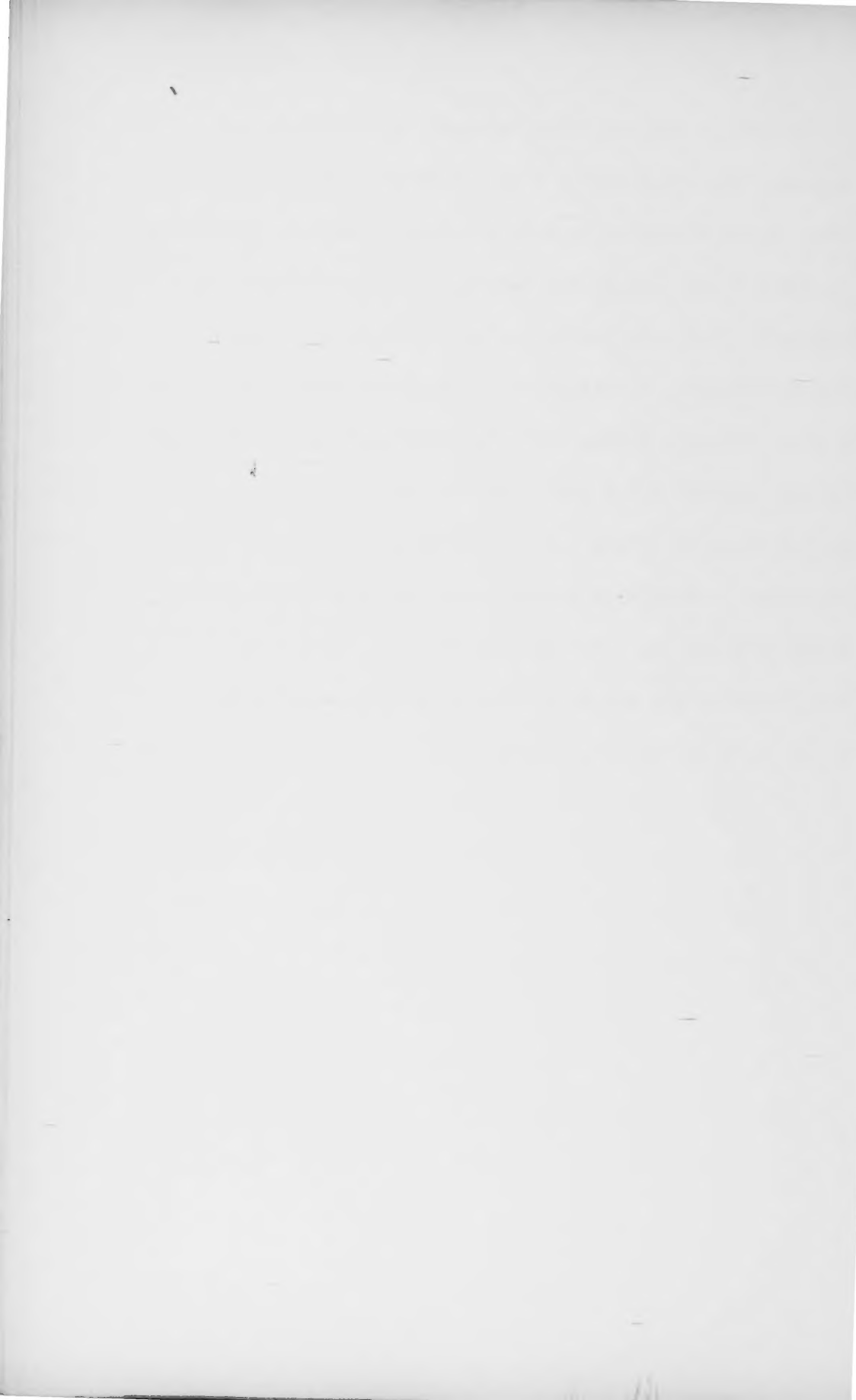


a Petition for Extension of Time within which to file the appeal from Referee Luich. The Workmen's Compensation Appeal Board did not address either the Rockwell or Calabro Petition, but rather issued a decision based upon the merits of the appeal. However, Rockwell again raised its contention that the appeal to the Board was untimely in its Brief with the Commonwealth Court. The timeliness of the appeal to the Commonwealth Court was not in issue.

The Commonwealth Court, in an unreported Opinion dated February 8, 1989, addressed the Employer's contentions and held that the Claimant's appeal to the Board was untimely and that the Board was without jurisdiction to entertain same. On the basis of its holding, that Court affirmed the decision of the Board and Referee Luich. Thereafter, Petitioner filed a timely Petition for Allowance of Appeal from the Commonwealth Court Order to the Supreme Court of Pennsylvania, Western



District. Petitioner sought allowance of appeal to determine the constitutionality of the Commonwealth Court decision as it pertains to the timeliness of Petitioner's Notice of Appeal from the Referee's decision. The Petition for Allowance of Appeal was denied by a Per Curiam Order of the Pennsylvania Supreme Court dated July 24, 1989. It is the constitutionality of the Pennsylvania Workmen's Compensation law, as applied and interpreted by the Commonwealth Court of Pennsylvania, that forms the basis of the within Writ of Certiorari.



ARGUMENT

Petitioner, Phyllis Beatty Calabro, respectfully requests that the within Writ be granted, as the instant case poses an important question of the constitutionality of the Pennsylvania Workmen's Compensation Law, and the regulations promulgated thereunder, as interpreted by the Commonwealth Court of Pennsylvania.

Mrs. Calabro submits that her right to equal protection and due process under Article XIV, Section 1 of the United States Constitution and Article I, Section 1 of the Pennsylvania Constitution have been violated by virtue of the decision of the Commonwealth Court and the refusal of the Pennsylvania Supreme Court to allow an appeal from said decision.



A. Mrs. Calabro's right to due process of law has been denied.

The United States Constitution mandates that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Constitution, Article XIV, Section 1. This mandate requires that the procedural safeguards of notice and opportunity for hearing be given to citizens before they can be deprived of property. The safeguards are necessary in administrative benefits cases where the action is adjudicatory in nature and involve substantive property rights. The matter before this Court is such a case.

In administrative proceedings due process generally requires that a citizen's property be protected by the rudimentary requirements of fair play. See e.g. West Ohio Gas Co. v. Public Utility Commission of Ohio, 55 S.Ct. 316, 294 U.S. 63, 79 L.Ed. 761. The instant case involves proceedings before an adminis-



trative agency of the Commonwealth of Pennsylvania.

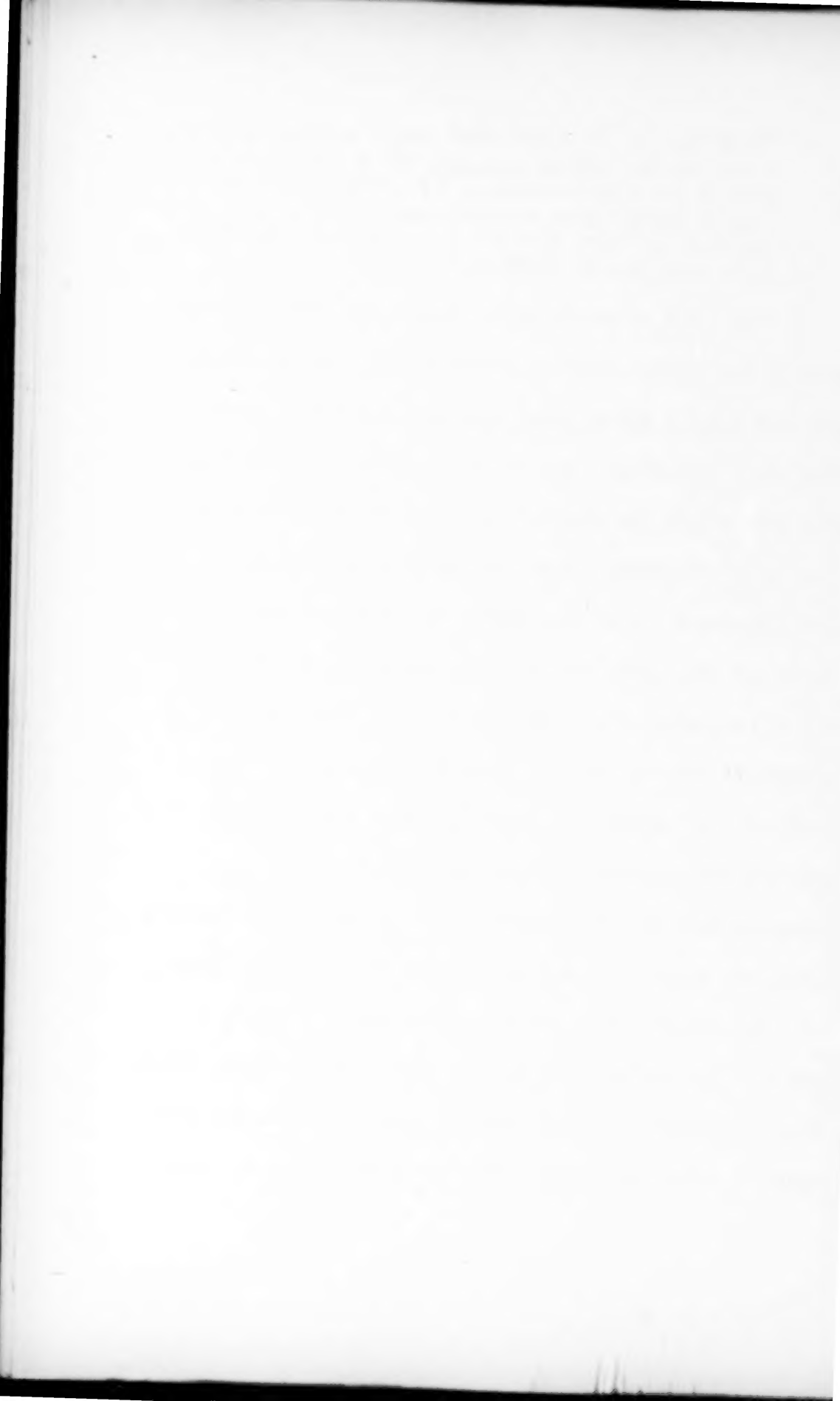
The Pennsylvania Legislature and courts have standardized the system of filing appeals from governmental units. It is well-established in Pennsylvania Workmen's Compensation cases that an appeal to the Workmen's Compensation Appeal Board is filed on the date of mailing. Mapp v. Philadelphia, 433 Pa. 517, 252 A.2d 684 (1969).

The Pennsylvania Workmen's Compensation Act provides that an appeal from the decision of a referee must be filed within twenty (20) days of notice of same. 77 P.S. Section 854. The Commonwealth Court of Pennsylvania held that Mrs. Calabro was on notice of the applicable appeal period and that she failed to file same within twenty (20) days after notice as required by the Act.

The Pennsylvania Workmen's Compensation Act, provides at Section 853 as follows:

"Any party in interest may, within twenty (20) days, after notice of a referee's award or disallowance of compensation shall have been served upon him, take an appeal to the Board. . . 75 P.S. Section 853 (emphasis added)."

The law clearly provides that the appeal shall be taken within twenty (20) days after notice shall have been served upon the party. The Act provides, at 77 P.S. Section 717 that notice shall be deemed served on the date when mailed. However, the Referee's decision in the instant case contains no indication of the date of mailing but merely sets forth a "date of circulation"; therefore, the Petitioner is without notice as to when the decision was mailed, or when the twenty (20) day appeal period commenced. This deficiency is compounded by the Decision's cover page notice that an appeal must be taken "within 20 days of the above date of circulation." Such a notice is defective as it fails to comply with the legislative and common law safeguards for appeal time periods, and is confusing to the



claimant.

It is clear that the legislature did not intend that the date of circulation set forth on the Notice be used interchangeably with or as a substitute for "date of mailing." This intention is clear from the Act itself as well as from the regulations promulgated by the Administrative Agency. The applicable regulations, contained at 34 Pennsylvania Code, Section 131.3 set forth the "Special Rules of Administrative Practice and Procedure before Referees." Those rules provide at subsection A that the date of circulation is defined as follows:

"The date affixed by the Bureau and shown on all assignments of petitions and referees' decisions. . ."

while service is defined as follows:

"Delivery in person or by mail. If service is by mail it shall be deemed served on the date postmarked and mailed by ordinary U.S. Mail."

Since the regulations make a clear distinction between the circulation of a



decision and its delivery, i.e., service, the 77 P.S. Section 853 notice requirement is not satisfied by mere showing the date of circulation. In the instant case, there has been no showing of proper notice, rather a mere showing of the date of circulation. Therefore, notice has not been given pursuant to the Act or the Pennsylvania Code regulations and Mrs. Calabro's appeal from the Referee's decision was not untimely as it was filed within twenty (20) days of her receipt of the decision.

In light of the Commonwealth Court's error, the Pennsylvania Supreme Court erred in refusing to allow Mrs. Calabro's appeal relating to the constitutionality of the Workmen's Compensation Act. These questions raise proper issues for review by this Honorable Court and therefore the within Writ must be granted.



B. The Act denies equal protection.

The Commonwealth Court's failure to construe the clear meaning of the legislature to distinguish between a date of circulation and a date of mailing constitutes a violation of Petitioner's right to equal protection under the law. The Court held that Mrs. Calabro was on notice of the applicable appeal period and that:

"Calabro's contentions to the contrary are devoid of merit and belied by the fact that her appeal to the Board, filed June 15, 1987,⁵ was accompanied by a Petition for Extension of Time within which to file." (Slip Op. 2-8-89, p. 2)

Footnote 5 of the Court's Opinion sets forth that: "although Calabro's appeal petition is dated June 12, 1987, the time stamps appearing thereon indicate that the Appeal and the Petition for Extension of Time were not filed until June 15, 1987." (Slip Op., id.). The Court incorrectly held that the appeal was not



filed until June 15, 1987, which would be more than twenty (20) days after Mrs. Calabro's May 23, 1987 receipt of the Referee's decision, when in fact the appeal was filed on June 12, 1987, within the twenty (20) day period.¹

Postal Certificates, USPS Form 3817 were retained with copies of Petitioner's appeal to the Board, and same clearly reflect the June 12, 1987 mail date. The Commonwealth Court holding that the appeal to the Board was filed on June 15, 1987, rather than the mail date June 12, 1987 violates Petitioner's right to equal protection as it enables the Workmen's Compensation Appeal Board, an administrative agency, to issue the decision without setting forth a mail date, although the Claimant's appeal is not deemed filed until received by the Board.

¹The file date of the appeal to the Board was not in issue prior to the Commonwealth Court decision of February 8, 1989. In fact the employer alleged that the appeal was filed on June 12, 1987. See, Motion to Dismiss filed with Workmen's Compensation Appeal Board. App. "C", Para. 4.



Petitioner further submits that the failure of the Court to require that the Referee set forth a date of mailing on her decision violates the Legislative mandate that notice be given, as set forth at 77 P.S.

Section 853. This breakdown of the administrative process has deprived Mrs. Calabro of both her due process right to notice and hearing as well as her right to equal protection under the laws. She has in effect, been subject to a double standard where the administrative agency (Labor & Industry Referee) is not obligated to set forth a date of notice on its decision, while the claimant must establish a date of filing of her appeal.

The Commonwealth Court's failure to recognize the constitutional infirmity of the Act is further evidenced by its finding that Mrs. Calabro failed to aver fraud or its equivalent in order to justify granting an appeal nunc pro tunc. To the contrary, Mrs.



Calabro clearly alleged that the Referee was negligent in failing to set forth a date of mailing as required by the Workmen's Compensation regulations. The Petition for Extension of Time, sets forth at paragraphs 7 and 12 allegations that the Referee failed to supply a mail date and therefore Claimant did not have notice of the decision until it was received.

Failure to set forth a mail date reflects the deficiency of the Act and as such the Court had the power to determine that the Referee was negligent, which negligence is a proper subject for granting of an appeal nunc pro tunc or an extension of time. In Weiss v. Cambridge Springs Borough, 262 Pa. 139, 104 A.2d 863 (1918), the Commonwealth Court held that "where a party has been prevented from appealing by fraud, or by the wrongful or negligent act of a court official, it has been held that the Court has power to extend the



time for taking an appeal." Id. at 144 (citations omitted). The Court's failure to apply its own precedent is in error and compounds the constitutional infirmity of the Act.

The administrative proceedings, coupled with the determination of the Commonwealth Court, and the Pennsylvania Supreme Court's subsequent refusal to review same, constitute an arbitrary and discriminatory application of the standards and procedures developed by the legislature to ensure equal treatment of all claimants. Significantly, the Department of Labor and Industry has not been held to the same standard as Mrs. Calabro, since the Commonwealth Court determined that the Referee's notice was served when "mailed" -- while no date of mailing was established, yet the Claimant's appeal was not filed until received. (Slip. Op. Commonwealth Court, 2-8-89, p. 2.) This application of time



limitations is arbitrary and discriminates against claimants. Petitioner is requesting that this Honorable Court review the within case to determine the constitutionality of the Act, regulations and proceedings relating to the Pennsylvania Workmen's Compensation law.

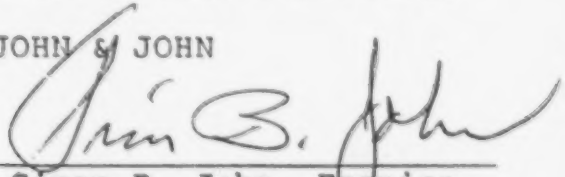


CONCLUSION

Your Petitioner, Phyllis Beatty Calabro, respectfully submits that, in light of the cases and arguments hereinabove set forth, the within Writ of Certiorari presents important questions concerning the constitutionality of the Pennsylvania Workmen's Compensation Act, and request that this Honorable Court review the instant matter.

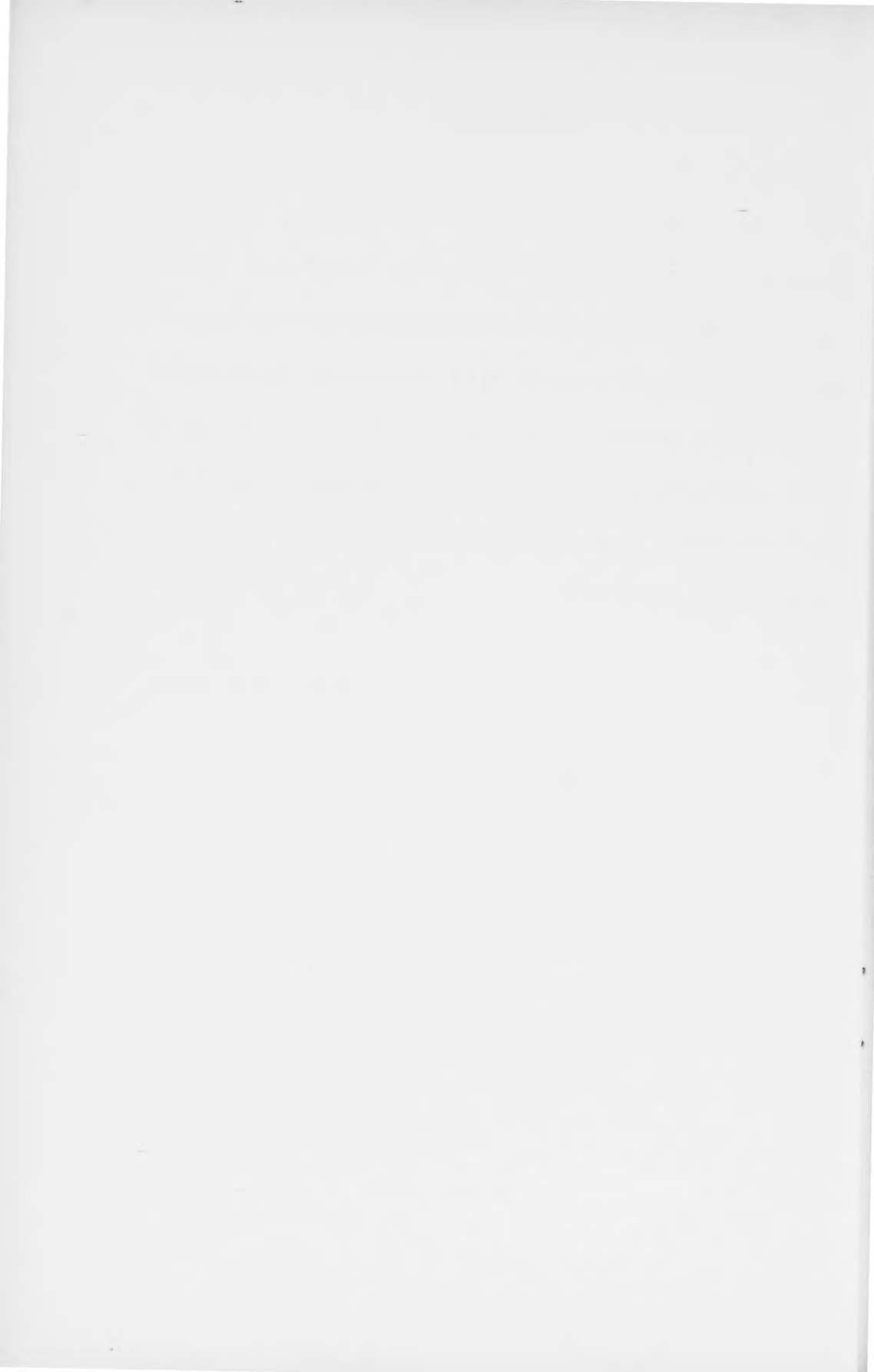
Respectfully submitted,

JOHN & JOHN

A handwritten signature in cursive script, appearing to read "Simon B. John", written over a horizontal line.

Simon B. John, Esquire
Attorneys for Petitioner
96 East Main Street
Uniontown, PA 15401
412-438-8560

DATED: October 19, 1989



APPENDIX

- A. Order of the Supreme Court of Pennsylvania, Western District, dated July 24, 1989.
- B. Order and Opinion of the Commonwealth Court of Pennsylvania, dated February 8, 1989.
- C. Order and Opinion of the Workmen's Compensation Appeal Board, dated April 13, 1988.
- D. Relevant portions of Constitutions, Statutes and Regulations involved.



APPENDIX "A"

The Supreme Court of Pennsylvania
Western District

Prothonotary 801 City-County Bldg.
Irma T. Gardner Pittsburgh, PA 15219
Deputy Prothonotary (412) 565-2816

July 24, 1989

Simon B. John, Esquire
John & John-
96 East Main Street
Uniontown, PA 15401

In Re: Phyllis Beatty Calabro v. Workmen's
Comp. (Rockwell)
No. 156 W. D. Allocatur Docket 1989

Dear Mr. John:

The Court has entered the following order
on your Petition for Allowance of Appeal in
the above matter:

"July 24, 1989
Petition Denied
Per Curiam"

Very truly yours,
s/Irma T. Garnder
Deputy Prothonotary

ITG:cho
cc: Norman R. Haigh, Sec.
William M. Radcliffe, Esq.
Hon. James R. Crumlish, Jr., P.J.



APPENDIX "B"

IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

PHYLLIS BEATTY CALABRO, :

Petitioner, :

v. : NO. 1134 C.D. 1988

WORKMEN'S COMPENSATION :

APPEAL BOARD (ROCKWELL :

INTERNATIONAL), :

Respondents :

BEFORE; HONORABLE JAMES CRUMLISH, JR.,
President Judge
HONORABLE JAMES GARDNER COLINS,
Judge
HONORABLE GENEVIEVE BLATT, Senior
Judge

SUBMITTED ON BRIEFS: October 25, 1988

OPINION NOT REPORTED



O P I N I O N

MEMORANDUM OPINION BY
PRESIDENT JUDGE CRUMLISH, JR.

FILED: February 8, 1989

Phyllis Beatty Calabro appeals a Workmen's Compensation Appeal Board order which, on remand, affirmed the referee and denied her claim petition. We affirm.¹

Calabro, a sand mixer for Rockwell International (Rockwell), injured her left shoulder and arm while moving a one-hundred pound bag of sand. Despite this injury, she worked intermittently over the next several months. The referee initially disallowed her claim petition, finding that her medical evidence was equivocal and not credible. The

¹Our scope of review is limited to determining whether the Board committed an error of law, made fact findings unsupported by substantial evidence or violated constitutional rights. Gabriel v. Workmen's Compensation Appeal Board (No. 1 Contracting Corp.), 102 Pa. Commonwealth Ct. 470, 518 A.2d 895 (1986).



Board reversed, finding instead that Calabro's medical testimony was unequivocal, and remanded for a clarification of the referee's credibility finding.² The referee then specifically credited the medical testimony of Rockwell's physician and concluded that Calabro had suffered no work-related disability.³

We initially address Rockwell's contention that Calabro's appeal should be quashed because she did not file an appeal to the Board on or before June 10, 1987, twenty days after the date the referee's second decision was served upon her. Section 423 of

²Because the Board could not determine whether the referee would have reached the same result absent the erroneous legal conclusion, it remanded pursuant to Marcks v. Workmen's Compensation Appeal Board, 65 Pa. Commonwealth Ct. 107, 442 A.2d 9 (1982).

³Rockwell's appeal from the Board's remand order was dismissed as an appeal from an interlocutory order by this Court's order dated September 11, 1986.



the The Pennsylvania Workmen's Compensation Act, 77 P.S. §853. The twenty-day limits is jurisdictional and may be raised at any time. Pittsburgh Moose Lodge #46 v. Workmen's Compensation Appeal Board (Grieco, Jr.), 109 Pa. Commonwealth Ct. 53, 530 A.2d 982 (1987). Calabro responds that although the referee's decision set forth May 21, 1987, as the "date of circulation," this date is not properly used as a substitute for the mailing date.

Here, the language prefacing the referee's decision clearly states that an appeal must be taken within twenty days of the date of circulation. Thus, Calabro was on notice of the applicable appeal period. Moreover, Calabro admits receiving the referee's decision on May 23, 1987,⁴ and, therefore, had ample time from the circulation

⁴"Petition for Extension of Time Within Which to File Appeal from Referee," para. 8.



date in which to file an appeal. Calabro's contentions to the contrary are devoid of merit and belied by the fact that her appeal to the Board, filed June 15, 1987,⁵ was accompanied by a petition for extension of time within which to file. Further, her petition fails to aver fraud or its equivalent in order to justify granting an appeal nunc pro tunc. Fritz v. Workmen's Compensation Appeal Board (Kim Manufacturing Co.), 107 Pa. Commonwealth Ct. 168, 527 A.2d 636 (1987).

Because the Board lacked jurisdiction to entertain Calabro's appeal, the referee's decision should stand, and for that reason we will reaffirm.⁶ Id.

Date: February 8, 1989 s/James Crumlish, Jr.
President Judge

⁵ Although Calabro's appeal petition is dated June 12, 1987, the time stamps appearing thereon indicate that the appeal and the petition for an extension of time were not filed until June 15, 1987.

⁶ Even were we to reach the merits, we perceive no error in the referee's clarification of her earlier order in which she again explicitly credited Rockwell's medical testimony and again denied Calabro's claim.



IN THE COMMONWEALTH COURT
OF
PENNSYLVANIA

PHYLLIS BEATTY CALABRO, :
Petitioner, :
v. : NO. 1134 C.D. 1988
WORKMEN'S COMPENSATION :
APPEAL BOARD (ROCKWELL :
INTERNATIONAL), :
Respondent :

ORDER

The Workmen's Compensation Appeal Board
order, No. A-93732 dated April 13, 1988, is
affirmed.

Date: February 8, 1989 s/James Crumlish, Jr.
President Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
FEB. 8, 1989

C.R. Hostutler
Deputy Prothonotary -
Chief Clerk



APPENDIX "C"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
WORKMEN'S COMPENSATION APPEAL BOARD
3607 DERRY STREET, FOURTH FLOOR
HARRISBURG, PA 17111
717-783-7838

Mailing Date: April 13, 1988

A-93732
PHYLLIS BEATTY CALABRO, Claimant
242 Wilson Avenue
Uniontown, PA 15401

ROCKWELL INTERNATIONAL, Defendant
Gallatin Avenue
Uniontown, PA 15401

Self-Insured

Simon B. John, Esquire
96 East Main Street
Uniontown, PA 15401

Gretchen Mundorff, Esquire
COLDREN, DEHAAS & RADCLIFFE
700 Gallatin Bank Building
Uniontown, PA 15401

Dear Sirs & Madam:

Enclosed is a copy of an Opinion from the
Workmen's Compensation Appeal Board filed this
date in the above-captioned case. The
decision of the Board is final unless an
appeal is taken to the appropriate court

within thirty (30) days of the above mailing date.

Very truly yours,

s/Norman R. Haigh

Secretary

Workmen's Compensation

Appeal Board



COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-93732

PHYLLIS BEATTY CALABRO, : Appeal by Claimant
Claimant
242 Wilson Avenue : from Order of
Uniontown, PA 15401 : Referee Luich

v.

ROCKWELL INTERNATIONAL, : Western District
Defendant : S.S. 166-36-6207
Gallatin Avenue :
Uniontown, PA 15401 :

AFFIRMED

(Pgh. - Sept., 1987)

Insurance Carrier: Self-Insured

Claimant's Counsel: Simon B. John, Esquire
96 East Main Street
Uniontown, PA 15401

Defendant's Counsel: Gretchen Mundorff, Esq.
700 Gallatin Bank Bldg.
Uniontown, PA 15401

P E R C U R I A M

Presently before the Board is Claimant's
appeal from the Decision of the Referee.

The matter was remanded by the Board on
the basis that the Referee found testimony



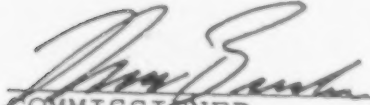
equivocal that the Board considered unequivocal. The Referee, upon remand, accepted the competent testimony of Defendant's medical witness over that of Claimant's expert. As the Court stated in Sell v. Workmen's Compensation Appeal Board, 62 Pa. Commonwealth Ct. 5, 434 A.2d 904, 906 (1981): "...that the referee does not automatically commit error by resolving conflicting testimony in a manner which distresses the appellant."

O R D E R

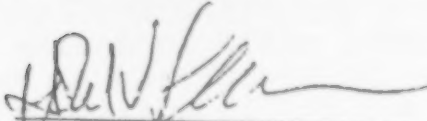
The Decision of the Referee is hereby affirmed and Claimant's appeal is denied.



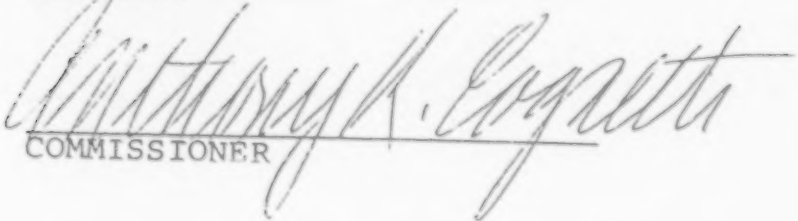
BY THE BOARD:



COMMISSIONER



CHAIRMAN



COMMISSIONER

COMMISSIONER

APR 13 1988



APPENDIX "D"

XIV: 1. United States Constitution, Article

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

2. Pennsylvania Constitution, Article I, Section I:

"Section I. Inherent rights of mankind.

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

3. The Pennsylvania Workmen's Compensation Act in pertinent part provides as follows:



"Section 717 - Service of notices and copies; record of.

. . . For the purposes of this article any notice or copy shall be deemed served on the date when mailed, properly stamped and addressed, and shall be presumed to have reached the party to be served; but any party may show by competent evidence that any notice or copy was not received, or that there was an unusual or unreasonable delay in its transmission through the mails. . ."

"Section 853 - Appeal to Board from award or disallowance of Referee; time for taking.

Any party in interest may, within twenty (20) days after notice of a Referee's award or disallowance of compensation shall have been served upon him, take an appeal to the Board on the ground:. . ."

"Section 854 - Findings on Appeal.

In any such appeal the Board may disregard the findings of fact of the Referee if not supported by competent evidence and if deem proper may hear other evidence, and may substitute for the findings of the referee such findings of fact as the evidence taken before the referee and the Board, as herein-before provided, may in the judgment of the Board, require, and may make such disallowance or award of compensation or other order as the facts so founded by it may require."



"34 Pa. Code, § 131.3: "Definitions".

- a. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:. . .

Date of Circulation -- the date affixed by the bureau and shown on all assignments of petitions and referees' decisions. . .

Service -- delivery in person or by mail. If service is by mail, it shall be deemed served on the date postmarked and mailed by ordinary United States Mail."